UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VIT FLORIAN, Plaintiff,	:	
v.	:	Civil Action 3:00CV897(CFD)
DANAHER CORP. and SNAP-ON TOOLS CO., Defendants.	:	

RULING ON MOTION TO DISMISS

This product liability action arose out of injuries that occurred while the plaintiff was operating a torque wrench at his work site in Canada. The plaintiff brought this action in the Connecticut Superior Court; it was later removed by the defendants to this court.[1] In his two-count amended complaint, the plaintiff alleges that the defendants are liable for his injuries under Conn. Gen. Stat. § 52-572m et seq., Connecticut's product liability statute. Pending is the defendants' Motion to Dismiss [Doc. # 16] on the basis of forum non conveniens. For the following reasons, the motion is granted, but with certain conditions.

I. Background

The plaintiff, a resident of Calgary, Alberta, Canada, was an employee of Bimac Industries, Ltd. ("Bimac"), a company located in Canada. On April 22, 1997, the plaintiff

[1]The defendants removed this action from Connecticut Superior Court pursuant to 28 U.S.C. § 1441 on the basis of diversity jurisdiction. According to the removal notice, the plaintiff is a Canadian citizen; defendant Danaher Corporation is incorporated in Delaware with its principal place of business in the District of Columbia; defendant Snap-On Tools Company is incorporated in Wisconsin and has its principal place of business there as well. Finally, the amount in controversy exceeds $75,000.

was injured while using a torque wrench[2] to tighten a bolt at his work site. According to the plaintiff, the handle of the wrench detached from its head, propelling him backwards onto a protruding piece of steel and resulting in significant physical and psychological injuries.

The plaintiff claims that the torque wrench was "manufactured, assembled, sold, leased, designed and/or distributed" by Snap-On Tools Co., Ltd. ("Snap-On"), and by Danaher Corporation ("Danaher") through one of its subsidiaries, the Danaher Tool Group. Snap-On has its principal place of business in Wisconsin and Danaher has its principal place of business in Washington, D.C, but the Danaher Tool Group is located in Simsbury, Connecticut.[3]

On October 14, 1997, the plaintiff filed suit in the Court of the Queen's Bench of Alberta, Judicial Center of Calgary (hereinafter "the Canadian action"). The only defendant in that action was Snap-On Tools of Canada, Ltd ("Snap-On Canada"). The

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[2]The nature of a torque wrench is unclear from the papers filed by the parties.

[3]There are very significant issues concerning whether the defendants here are appropriate. The defendants claim that the handle of the torque wrench was not made by the Danaher Corporation, the Danaher Tool Group or Snap-On, but was manufactured by KD Tools, a company located in Lancaster, Pennsylvania. According to the defendants, KD Tools was acquired by Easco Corporation and later became part of Easco Hand Tools, Inc., an independently-incorporated indirect subsidiary of Danaher. As evidence of this relationship, Danaher points to the affidavit of accident investigator and Danaher Tool Group employee Anthony J. Williams. Williams states that Danaher "did not manufacture, assemble, lease, design, or distribute the handle for the wrench at issue in this case or any other component of that wrench" and explains that KD Tools manufactured some of the components used on torque wrenches similar to the one at issue here. Further, the defendants claim that the torque wrench was sold not by Snap-On, but by Snap-On Tools of Canada, Ltd, though the precise relationship between the two is not clear. However, given that the pending motion to dismiss relates only to personal jurisdiction, the Court will assume for the purposes of its ruling that the correct defendants have been named.

plaintiff voluntarily discontinued the Canadian action on January 29, 1999.

Here, the defendants argue that this action should be dismissed on the basis of the doctrine of forum non conveniens for several reasons, including that (1) it arises from an accident at a Canadian workplace, (2) the plaintiff is a citizen of Canada, and (3) Canada provides an adequate alternative forum.[4]

II. Standard

"The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized." Gulf Oil Corp v. Gilbert, 330 U.S. 501, 507 (1947). "The forum non conveniens determination is committed to the sound discretion of the trial court." Piper Aircraft, 454 U.S. at 254. "The burden of proof to demonstrate that the forum is not convenient is on defendant seeking dismissal." DiRenzo v. Philip Servs. Corp., 232 F.3d 49, 57 (2d Cir. 2000) (citing PT United Can Co. v. Crown Cork & Seal Co., 139 F.3d 65, 74 (2d Cir. 1998)),

In determining whether a case should be dismissed based on forum non conveniens, the court first must determine whether there is an alternative forum that has jurisdiction to hear the case. See DiRenzo, 232 F.3d at 57 (citing Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 46 (2d Cir. 1996)). An alternative forum is generally adequate

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[4]Although motions to dismiss based on forum non conveniens are generally supported by affidavit proof before discovery, the affidavit of Danaher's investigator is the only such document submitted by either party, although the plaintiff has also attached the defendants' responses to his requests to admit. Additional evidence clearly would have been useful. However, in Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981), the Supreme Court rejected the notion "that defendants seeking forum non conveniens dismissal must submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum." See 454 U.S. at 258. Instead, the defendants "must provide enough information to enable the District Court to balance the parties' interests." Id. Here, there is enough information to do so.

if the defendant is amenable to process there and the forum permits litigation of the subject matter of the dispute. See Capital Currency Exchange, N.V. v. National Westminster Bank PLC, 155 F.3d 603, 609 (2d Cir. 1998) (citing Piper Aircraft, 454 U.S. at 254 & n.22). Further, a forum may be inadequate in certain rare circumstances where the remedy is so unsatisfactory that it is no remedy at all, though the "mere fact that the foreign and home fora have different laws does not ordinarily make the foreign forum inadequate." DiRienzo, 232 F.3d at 57.

If the court concludes that the alternative forum is adequate,

> A defendant must next demonstrate that the ordinarily strong presumption favoring the plaintiff's chosen forum is countered by the private and public interest factors set out in Gilbert, which weigh so heavily in favor of the foreign forum that they overcome the presumption for plaintiffs' choice of forum. Gilbert directs that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

DiRenzo, 232 F.3d at 56-57 (quoting Gilbert, 330 U.S. at 508) (citations omitted); see also Guidi v. Inter-Continental Hotels Corp., 224 F.3d 142, 146 (2d Cir. 2000). This presumption in favor of the plaintiff's choice of forum is especially important when the defendant resides in the chosen forum. See Peregrine Myanmar, 89 F.3d at 46. However, when the plaintiff is either a foreign corporation or a foreign-national individual residing abroad, his or her choice of forum is entitled to less deference. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 103 (2d Cir. 2000). Nevertheless, "this reduced weight is not an invitation to accord a foreign plaintiff's selection of an American forum *no* deference since dismissal for forum non conveniens is the exception rather than the rule." See R. Maganlal & Co. v. M.G. Chemical Co., 942 F.2d 164, 168 (2d Cir. 1991) (quotations omitted).

Thus, as stated above, "a defendant must still show that the balance of convenience sufficiently favors trial in the foreign forum to overcome the presumption in favor of the plaintiff's choice." Id. In other words, the court should next turn to the public and private interest factors outlined in Gilbert "to see if they shift the balance away from the plaintiffs' choice of forum." DiRienzo, 232 F.3d at 63. The private interests to be considered include: (1) ease of access to evidence, (2) the cost for willing witnesses to attend trial; (3) the availability of compulsory process for unwilling witnesses; (4) other factors that might shorten trial or make it less expensive; and (5) "if relevant, the possibility of a view of premises." Id. at 66 (citing Gilbert, 330 U.S. at 508) (additional citation omitted). Courts may consider the difficulty in enforcing foreign judgments as a private interest factor. See Gilbert, 330 U.S. at 508. The public interests to be considered include: (1) administrative difficulties associated with court congestion; (2) the unfairness of imposing jury duty on communities with no relation to the case; (3) the local interest in having local disputes decided at home; (4) avoiding problems in conflict of laws and applying foreign law. See id. at 63 (citing Gilbert, 330 U.S. at 508-09).

III. Discussion

A. Adequate alternative forum

The defendants argue that Canada provides an adequate alternative forum for the plaintiff. Danaher argues that Snap-On Canada, rather than Snap-On, is the proper defendant because it assembled and distributed the tool at issue.[5] Further, Danaher points

[5]This point is of no consequence because the proper defendants are to be decided later in this action and not in the context of a motion to dismiss based upon the doctrine of forum non conveniens.

out that Canada has a highly developed body of products liability law. The plaintiff argues that Canada does not provide an adequate alternative forum because the Danaher Tool Company[6] is not subject to service of process in Canada.

The plaintiff does not argue that the remedy available in the Canadian judicial system is unsatisfactory because of any differences in Canadian law. DiRienzo, 232 F.3d at 57. However, while a Canadian forum may permit litigation of the subject matter of the dispute, the plaintiff may not be able to pursue this action in Canada because Danaher and Snap-On may not be amenable to suit there. See Capital Currency Exchange, 155 F.3d at 609. Consequently, given that the public and private interest factors point towards litigation of this dispute in Canada, the Court will make its dismissal conditional. See Blanco v. Banco Industrial de Venezuela, S.A., 997 F.2d 974, 984 (2d Cir. 1993) ("[F]orum non conveniens dismissals are often appropriately conditioned to protect the party opposing dismissal."). The defendants must agree to submit to the jurisdiction of the Canadian courts and waive any defense based on the statute of limitations. Courts have indicated that it is not unusual to condition dismissal on the defendant agreeing to consent to the foreign court's personal jurisdiction over it and to waive the statute of limitations as a defense. See, e.g., In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 203-04 (2d Cir. 1987); Doe v. Hyland Therapeutics Div., 807 F. Supp. 1117, 1124 (S.D.N.Y. 1992). Additionally, while Snap-On argues that Snap-On Canada is subject to suit in Canada, Snap-On itself must also agree to submit to the jurisdiction of the Canadian

[6]The plaintiff refers to the "Danaher Tool Company" in the section of his memorandum discussing the adequacy of Canada as an alternative forum. The Court assumes that this reference should be to the "Danaher Tool Corporation."

courts. See Jota v. Texaco Inc., 157 F.3d 153, 158 (2d Cir. 1998) (holding that Texaco must agree to submit to the jurisdiction of the Ecuadoran courts even when one of its subsidiaries was subject to suit there).[7]

B. Public and private interest factors

While the plaintiff's choice of forum in this case is accorded less weight because he is a foreign citizen residing abroad, his choice still is given some deference. See Maganlal, 942 F.2d at 168. The Court notes that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Gilbert, 330 U.S. at 508 (quoted in DiRenzo, 232 F.3d at 56-57). Nevertheless, here the public and private interest factors outlined in Gilbert shift the balance away from the plaintiffs' choice of forum. See DiRienzo, 232 F.3d at 63.

1. Private interest factors

First, much of the relevant evidence would be more accessible if this action were pursued in Canada. The plaintiff's product liability claim involves allegations of negligence, breach of the implied warranty of merchantability, breach of express warranty, failure to warn, and negligent misrepresentation. The plaintiff argues that this action should remain in Connecticut because the defendants' responses to his requests for admissions indicate that copies of repair records for the torque wrench were received by Mr. Williams as part of his investigation, and are located here. However, the broad scope of the plaintiff's product liability allegations indicate that both parties will need to rely on

[7]In addition, it is not appropriate to decide at this juncture whether Snap On or Snap On Canada is the appropriate defendant as the assembler or distributor or the torque wrench; that is left for further resolution by the appropriate court.

other evidence in addition to the records received by Mr. Williams. For example, given that the accident occurred in Canada, original records relating to Bimac's repair and maintenance of the torque wrench, as well as information regarding conditions and safety precautions at the site, are located in Canada. Based on the representation of Snap-On's attorney that the torque wrench was sold by Snap-On Canada, it also appears that records of this sale would be located in Canada. In addition, reports from the plaintiff's physicians are presumably located in Canada, given that the plaintiff is a resident of Calgary.

The cost for "willing witnesses" to attend trial will be more significant if this case were tried in this district. Although the plaintiff argues that Mr. Williams is the only witness who is needed in this case, this representation is not realistic given the nature of this action. The parties would certainly need to call other witnesses presently located in Canada on both liability and damages issues. It is reasonable to assume that employees of Bimac who witnessed the accident occur will be needed, as well as medical witnesses who treated the plaintiff. Thus, given the number of potential witnesses who are residents of Canada, this second factor points towards litigation of this dispute in Canada.[8]

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[8]Third, several potential non-party witnesses reside in Canada, and thus they are not subject to compulsory service in Connecticut if they are unwilling to testify. For instance, employees of Bimac are not parties to this suit, and thus may not be compelled to produce documents or to submit to an inspection under Fed. R. Civ. P. 34(c). The same may be true for or any individual who performed repairs on the torque wrench, as it is unclear if such individuals were employees of Snap-On. Deposition testimony of these Canadian witnesses, if they are unwilling to testify, may be available under Fed. R. Civ. P. 28(b) through the use of letter requests, or letters rogatory. See DiRienzo, 232 F.3d at 66 (quoting Overseas Programming Companies, Ltd. v. Cinematographische Commerz-Anstalt, 684 F.2d 232, 235 (2d Cir. 1982) ("[A]ny difficulties that the Court might encounter regarding witnesses whose attendance the Court is unable to compel can most likely be resolved by the use of deposition testimony or letters rogatory."). However, execution of such letter requests with respect to such witnesses may prolong this litigation, making it unnecessarily costly. See 4 Moore's Federal Practice, § 28.12[1].

The defendants further argue that they may required to implead additional Canadian defendants responsible for modifying the tool after it was sold and distributed. Their ability to do so would be significantly hindered if this case is tried in this district, and this is one factor that favors dismissal on the ground of forum non conveniens. See Allstate Life Ins. Co. v. Linter Group, Ltd., 994 F.2d 996, 1002 (2d Cir. 1993) (quoting Piper Aircraft, 454 U.S. at 259).

On balance, the Court concludes that its consideration of the private interest factors indicates that Canada is the more appropriate forum for this dispute.

2. Public interest factors

With respect to the relevant public interest factors, the defendants first contend that local jurors would be burdened unnecessarily if they were selected to hear this case. They note that plaintiff stated that trial in the Canadian case would have lasted 25 days, a significant obligation. Further, this case would have little impact on the community from which the jurors would be chosen because not only is the plaintiff a Canadian resident, but there are significant questions whether the Danaher Tool Group was involved in the manufacture or distribution of the handle of the allegedly defective wrench. However, given that both of the defendants have some presence in this state, a jury here would not be without any interest in the dispute. Nevertheless, it appears as though a Canadian jury would have a greater interest in this case.

Second, the defendants argue that this action involves a Canadian dispute, and thus Canada is the "local" forum appropriate for its resolution. At the same time, however,

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In contrast, the testimony of Mr. Williams could be admitted through the use of a deposition.

while the accident occurred in Canada and the plaintiff is Canadian, an American company may have manufactured the allegedly defective handle at issue. Thus, although Canada may have a greater interest in this dispute, the Court notes that this country has an interest as well. Further, as the defendants argue, a significant portion of this dispute will concern the repair and maintenance of the tool, as well as conditions at the Canadian work site. These issues likely relate to Canadian individuals and businesses. Thus, the Court concludes that Canada has a greater interest in the resolution of this dispute.

Finally, based on Connecticut choice of law principles, it appears at least preliminarily that Canadian law would be applied to this lawsuit. "While the Court need not definitively resolve the choice of law issue at this point, the likelihood that foreign law will apply weighs against retention of the action." Ioannides v. Marika Maritime Corp., 928 F.Supp. 374, 379 (S.D.N.Y.1996).

In diversity cases, the District courts must apply the conflict of law principles of the state in which they sit. See Klaxon Company v. Stentor Electric Manuf., 313 U.S. 487, 496 (1941); Piper Aircraft, 454 U.S. at 244 n.8; Continental Cas. Co. v. Pullman, Comley, Bradley & Reeves, 929 F.2d 103, 105 (2d Cir. 1991). There are two conflict of law tests under Connecticut law used to determine the law to apply. First, according to the principle of lex loci delicti, courts in tort actions look to the law at the place of injury. See O'Connor v. O'Connor, 519 A.2d 13, 15 (Conn. 1986). However, the Connecticut Supreme Court also has held that courts "should incorporate the guidelines of the Restatement [(Second) of Conflict of Laws] as the governing principles for those cases in which application of the doctrine of lex loci would produce an arbitrary, irrational result." Id. at 21-22. According to the Restatement approach, "[t]he rights and liabilities of the

parties with respect to an issue are determined by the local law of the state which, respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6." Id. at 22 (quoting Restatement (Second) of Conflict of Laws § 145).[9]

> Section 6 of the Restatement, in turn, provides: "(1) a court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protections of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied." ...
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> For assistance in our evaluation of the policy choices set out in §§ 145(1) and 6(2), we turn next to § 145(2) of the Restatement, which establishes black-letter rules of priority to facilitate the application of the principles of § 6 to tort cases. . . . Section 145(2) provides: "Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. These contacts are to be evaluated according to their relative importance with respect to the particular issue."

Id. (internal citation omitted).

Here, applying the law of the place of injury would not produce an arbitrary or irrational approach. Thus, it appears that the Court need not apply the principles of the Restatement. However, even if the Restatement test were considered, Canada is the

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[9]The Court also notes that docket congestion is another public interest factor that may be considered, but here, neither the plaintiff nor the defendants have advanced any arguments relating to it. Therefore, the Court does not conclude that this factor points towards any particular forum.

forum with the most significant relationship to the dispute. First, as stated above, the place of injury is in Canada. With respect to the second factor, it is not clear at this time where the conduct causing injury occurred. The torque wrench may have been defective when allegedly manufactured in the United States by Danaher or the Danaher Tool Group (as the plaintiff claims) or KD Tools (as the defendants speculate); it have been altered at its Canadian distributor; it may have been improperly repaired at the plaintiff's work site in Canada; or the plaintiff's own conduct might have contributed to his injuries. Therefore, the second factor is inconclusive. Similarly, the third factor does not point towards a particular forum, as the plaintiff is Canadian and the defendants are incorporated in the United States.[10] Fourth, the center of the relationship between the plaintiff and the defendants appears to be in Canada, where he operated the tool that the defendants allegedly manufactured and sold. Considered together, the first and fourth factor indicates that Canada has the most significant relationship to this dispute. Thus, both tests indicate that Canadian law would be applied to this action, though the Court notes that "it is well-established that the need to apply foreign law is not alone sufficient to dismiss under the doctrine of forum non conveniens." Maganlal, 942 F.2d at 169 (citations omitted).

The Court concludes that the public interest factors also indicate that this action should be tried in Canada.

Conclusion

Based on the public and private interest factors, the Court concludes that the balance of the factors point towards a Canadian forum, keeping in mind the deference

[10]It appears that both do business in Canada, however.

owed the plaintiff's choice of forum and the fact that the defendants reside in this forum. Accordingly, this case is dismissed on the basis of forum non conveniens, in accordance with the conditions outlined above, and the Clerk is ordered to close this case. The defendants are ordered to indicate within **thirty days of the date of this ruling** whether they will agree to submit to jurisdiction in Canada, waive any statute of limitations defense, and agree to be bound by any Canadian judgment. If the defendants so not agree, the case will be restored to this docket.

SO ORDERED this _____ day of November 2001 at Hartford, Connecticut.

_____/s/_____
Christopher F. Droney
United States District Judge